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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

Applicant: Timothy V. Stagg et al.

Examiner: Robert A. Madsen

Serial No.: 09/728,697

Group Art Unit: 1761

Filed: December 1, 2000

Docket No.: M120.131.101 (54186US017)

**File Date: January 19, 2005**

**Title: PLASTIC FILM PACKAGING WITH TEARABLE TAPE STRIP**

**Mail Stop Appeal Brief - Patents**

Commissioner for Patents

P.O. Box 1450

Alexandria, VA 22313-1450

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We are transmitting herewith the attached:

- ☒ Transmittal Sheet containing Certificate of Mailing (1 pg.).
- ☒ Appeal Brief to the Board of Patent Appeals and Interferences of the U.S. Patent and Trademark Office (14 pgs.).
- ☒ Appendix A (7 pgs.).
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CLAIMS AS AMENDED						
	(1) Claims Remaining After Amendment		(2) Highest Number Previously Paid For	(3) Present Extra	Rate	Fee
TOTAL CLAIMS	43	-	44	0	x 50.00 =	\$0.00
INDEPENDENT CLAIMS	3	-	3	0	x 200.00 =	\$0.00
[ ] MULTIPLE DEPENDENT CLAIMS PRESENTED						\$0.00
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Name: Timothy A. Czaja

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The undersigned hereby certifies that this paper or papers, as described herein, are being deposited in the United States Postal Service, as first class mail, in an envelope addressed to: **Mail Stop Appeal Brief - Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450** on this 19<sup>th</sup> day of January, 2005.

By: *[Signature]*

Name: Timothy A. Czaja



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P.O. Box 1450

Alexandria, VA 22313-1450

Dear Sir/Madam:

**APPEAL BRIEF**

This Brief is presented in support of the Notice of Appeal filed on November 19, 2004, from the final rejection dated September 22, 2004, rejecting claims 1, 2, 4-9, 11, 13-18, 20-25, 27, 29-33, 35-39, 41, 42, 44-52, and 56 of the above identified application.

The U.S. Patent and Trademark Office is hereby authorized the Charge Deposit Account No. 50-0471 in the amount of \$500.00 for filing a Brief in Support of an Appeal as set forth under 37 C.F.R. §41.20(b)(2) and the modified fee schedule effective December 8, 2004. However, at any time during the pendency of this application, please charge any fees required or credit any overpayment to Deposit Account No. 50-0471 pursuant to 37 C.F.R. §1.25. Additionally, please charge any other fees under 37 C.F.R. §1.16, 1.17, 1.19, 1.20, 1.21, and 41.20 to Deposit Account No. 50-0471.

Appellant respectfully requests reversal of the Examiner's rejection of pending claims 1, 2, 4-9, 11, 13-18, 20-25, 27, 29-33, 35-39, 41, 42, 44-52, and 56.

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**REAL PARTY IN INTEREST**

The present application has been assigned to 3M Innovative Properties Company, a Delaware corporation doing business in Saint Paul, Minnesota, in an Assignment.

**RELATED APPEALS AND INTERFERENCES**

There are no other appeals or interferences known to Appellant that will have a bearing on the Board's decision in the present Appeal.

**STATUS OF THE CLAIMS**

Claims 1, 2, 4-9, 11, 13-18, 20-25, 27, 29-33, 35-39, 41, 42, 44-52, and 56 are pending in the application. Claims 3, 10, 12, 19, 26, 28, 34, 40, 43, and 53-55 have been cancelled from the application. Claims 1, 2, 4-9, 11, 13-18, 20-25, 27, 29-33, 35-39, 41, 42, 44-52, and 56 have been finally rejected. Claims 1, 2, 4-9, 11, 13-18, 20-25, 27, 29-33, 35-39, 41, 42, 44-52, and 56 are the subject of the present Appeal.

**STATUS OF THE AMENDMENTS**

No amendments have been made since the Amendment filed June 25, 2004 entered in the Final Office Action dated September 22, 2004. The claims listed in the Claims Appendix reflect the claims as amended.

**SUMMARY OF THE INVENTION**

The claimed invention addresses the extreme difficulty associated with utilizing tear strips with tear-resistant films exhibiting puncture propagation tear resistances of 20 N/ply or greater. Unlike easily torn films or papers, the films with which the present invention is primarily concerned readily stretch before tearing, making it virtually impossible for conventional tear strips to be useful. Conventional tear strips cannot tear a "clean" opening through such films if they were not weakened somehow. In order to avoid the necessity of either weakening such tear resistant films, or resorting to the use of a cutting tool, each of independent claims 1, 17, and 38 relates to the effective use of tearable tape strips in conjunction with such

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tear resistant packaging. With reference to the language of claim 1, the packaging comprises a continuous, tear-resistant film formable to define an enclosed region and characterized by puncture-propagation tear resistance of at least 20 N/ply. *See, e.g., Application* at page 13, lines 12-32 to page 14, lines 1-31; FIGS. 8A & 8B, ref. nos. 102, 106, 108. A tearable tape strip is secured to the film. *See, e.g., Application* at page 18, lines 10-19; FIGS. 8A, 8B, & 9A, ref. nos. 100, 140, 144. The tearable tape strip is defined by opposing longitudinal edges and a central section, the central section being tearable relative to the opposing, longitudinal edges such that the tape strip is internally tearable. *See, e.g., Application* at page 15, lines 1-24; FIG. 9A, ref. nos. 110, 120 (not shown, but located between 122), 122. The tearable tape strip comprises one of reinforced strapping tape and filament reinforced tape, and is configured to controllably tear an opening through the film for accessing the enclosed region upon tearing the tearable tape strip. *See, e.g., Application* at page 15, lines 3-8 & page 15, lines 37-32 to page 16, lines 1-3; FIG. 9A, ref. no. 110.

**GROUND OF REJECTION TO BE REVIEWED ON APPEAL**

- I. Rejection of Independent Claims 1, 17, and 38 (and Various Claims Depending Therefrom) Under 35 U.S.C. §103(a) as Unpatentable Over U.S. Pat. No. 4,773,541 (“Riddell”) in View of U.S. Pat. No. 4,397,703 (“Osborn”)
  
- II. The Rejection of Independent Claims 1, 17, and 38 (and Various Claims Depending Therefrom) Under 35 U.S.C. §103(a) as Unpatentable Over U.S. Pat. No. 3,179,326 (“Underwood”) in View of U.S. Pat. No. 4,397,703 (“Osborn”) and U.S. Pat. No. 5,080,857 (“Leseman”)

**ARGUMENT**

**The Applicable Law**

The Examiner has the burden under 35 U.S.C. §103 to establish a *prima facie* case of obviousness. *In re Fine*, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988). Three

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criteria must be satisfied to establish a *prima facie* case of obviousness. First, the Examiner must show that some objective teaching in the prior art or some knowledge generally available to one of ordinary skill in the art would teach, suggest, or motivate one to modify a reference or to combine the teachings of multiple references. *Id.* Second, the prior art can be modified or combined only so long as there is a reasonable expectation of success. *In re Merck & Co., Inc.*, 800 F.2d 1091, 2315 USPQ 375, 379 (Fed. Cir. 1986). Third, the prior art reference or combined prior art references must teach or suggest all of the claim limitations. *In re Royka*, 490 F.2d 981, 180 USPQ 580 (C.C.P.A. 1974).

The court in *Fine* stated:

Obviousness is tested by “what the combined teaching of the references would have suggested to those of ordinary skill in the art.” But it “cannot be established by combining the teachings of the prior art to produce the claimed invention, absent some teaching or suggestion supporting the combination.” And “teachings of references can be combined *only* if there is some suggestion or incentive to do so.”

*In re Fine*, 5 USPQ2d at 1599 (citations omitted).

An invention can be obvious even though the suggestion to combine prior art teachings is not found in a specific reference. *In re Oetiker*, 24 USPQ2d 1443 (Fed. Cir. 1992). It is not necessary that the cited references or prior art specifically suggest making the combination, but there must be some teaching somewhere which provides the suggestion or motivation to combine prior art teachings and applies that combination to solve the same or similar problem which it addresses. *In re Nilssen*, 851 F.2d 1401, 1403, 7 USPQ2d 1500, 1502 (Fed. Cir. 1988); *In re Wood*, 599 F.2d 1032, 1037, 202 USPQ 171, 174 (C.C.P.A. 1979).

The test for obviousness under §103 must take into consideration the invention as a whole; that is, one must consider the particular problem solved by the combination of elements that define the invention. *Interconnect Planning Corp. v. Feil*, 774 F.2d 1132, 1143, 227 USPQ 543, 551 (Fed. Cir. 1985). Furthermore, claims must be interpreted in light of the specification, claim language, other claims, and prosecution history. *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561, 1568, 1 USPQ2d 1593, 1597 (Fed. Cir. 1987), *cert. denied*, 481 U.S. 1052 (1987). At the same time, a prior patent cited as a §103 reference must be considered in its entirety, “*i.e.* as a *whole*, including portions that lead away from the invention.” *Id.* That is, the Examiner must

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recognize and consider not only the similarities, but also the critical differences between the claimed invention and the prior art as one of the factual inquiries pertinent to any obviousness inquiry under 35 U.S.C. §103. *In re Bond*, 910 F.2d 831, 834, 15 USPQ2d 1566, 1568 (Fed. Cir. 1990). Finally, the Examiner must avoid hindsight. *Id.*

**I. Rejection of Independent Claims 1, 17, and 38, (and Various Claims Depending Therefrom) Under 35 U.S.C. §103(a) as Unpatentable Over U.S. Pat. No. 4,773,541 (“Riddell”) in View of U.S. Pat. No. 4,397,703 (“Osborn”)**

Independent claims 1, 17, and 38 were rejected under 35 U.S.C. §103(a) as being unpatentable over Riddell in view of Osborn in a final office action mailed September 22, 2004 (“FOA 9-22-04”). More particularly, the Examiner rejected claims 1, 2, 4, 5, 11, 13, 17, 18, 20, 21, 27, 29, 35-38, 41, 42, 44, 45, 47, 51, and 52 on those grounds. The Examiner also rejected claims 8, 14-16, 24, 31, and 32 under 35 U.S.C. §103(a) as unpatentable over Riddell in view of Osborn as applied above, and further in view of U.S. Pat. No. 5,203,634 (“Kim”).

In the Final Office Action, the Examiner recognized that Riddell is silent regarding materials exhibiting a puncture propagation tear resistance of 20 N/ply, relying on Osborn as evidence of the conventionality of such materials in order to modify Riddell. FOA 9-22-04 at 3. A principal purpose of Riddell is to replace cardboard boxes used for shipping and cardboard used for display trays with inexpensive packaging that converts into a display tray or trays upon opening, such that retailers can both ship and display goods within the packaging. In particular, Riddell addresses packaging having a tear-away opening feature circumscribing the inside of the package that, after opening, enables non-discarded portions of the package to be utilized as retail display containers. *Riddell* at col. 1, lines 7-16; col. 2, line 64 - col. 3, line 3. Riddell utilizes a pull strip design that allows a user to separate the package into the two “trays” used for displaying and holding products. *E.g.*, *Riddell* at FIGS. 1-4.

It should be readily understood that the package material, serving to replace the use of cardboard shipping and display packaging, is a crucial aspect of Riddell’s functionality and intended use. While attesting to the importance of material selection in order to satisfy the dual goals of shipping and display functionality, Riddell mandates that the packaging materials must

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have both “shipping and display stiffness and durability,” with “sufficiently low tear strength to permit opening of the package.” *Riddell* at col. 2, lines 12-17. *Riddell* focuses on a paper material, kraft paper, as the preferred material meeting such requirements, but also indicates that certain “polyethylene films” could also be suitable, an indication which the Examiner improperly relies on, as will be described in greater detail below.

Seeking to fulfill a very different purpose, Osborn addresses techniques for forming low-density polyethylene (“LDPE”) and high-density polyethylene (“HDPE”) into fiber-reinforced shipping sacks and tarps. *Osborn* at col. 1, lines 7-34. Osborn does not mention using pull strips to secure and open such bags, much less pull strips similar to the ones discussed in *Riddell*, but instead utilizes lap seams. *Osborn* at col. 16, lines 29-44. In discussing the efficacy of fiber-reinforced sacks, Osborn references puncture-propagation tear (“PPT”) results for non fiber-reinforced, “commercial bags” formed of 6-mil and 9-mil LDPE. *Osborn* at col. 19, lines 36-38; col. 20, tbl. II. The Examiner relies on Table II as evidence that materials having puncture propagation tear resistances of at least 20 N/ply are conventional for packaging and shipping, and thus, one having ordinary skill would be motivated to substitute these materials for the “polyethylene films referred to in *Riddell*.” *FOA 9-22-04* at 3.

In rejecting independent claims 1, 17, and 38 on these grounds, the Examiner failed to establish a *prima facie* case of obviousness. Simply put, one skilled in the art would not look to bag materials to make boxes. Osborn might be indicative of the conventionality of using 6-mil and 9-mil LDPE for commercial bags or sacks. However, *Riddell* seeks to fulfill a different purpose than Osborn. Indeed, *Riddell* expressly teaches away from the pliability associated with Osborn’s bags and sacks by requiring both shipping and display stiffness, most readily compared to the stiffness associated with the cardboard boxes *Riddell* seeks to replace. *See Riddell* at col. 1, lines 7-16.

In contrast to stiff, cardboard-like materials, tear-resistant materials (*i.e.*, those having propagation tear resistances of greater than 20 N/ply) are characterized by deformability. *See Application* at 11, lines 8-10. “Tear-resistance” is a “function of the material type, the material thickness, and material processing.” *Application* at 14, lines 22-23. The simple fact that *Riddell* says, “polyethylene films,” does not mean one having ordinary skill in the art would understand



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Riddell to be compatible with polyethylene films of the proper type, thickness, and processing to be considered “tear resistant” as required by the limitations of independent claims 1, 17, and 38. Instead, “polyethylene films” as disclosed in Riddell, must be considered in light of the reference as a whole, including Riddell’s stated purpose of providing sufficiently stiff shipping and display packaging. Indeed, if Riddell were to incorporate the bag materials of Osborn, it is unlikely that the packaging of Riddell would continue to properly function as a sufficiently stiff shipping package and display tray. Thus, contrary to the Examiner’s assertion, substituting the “polyethylene films” of Riddell with the 6-mil or 9-mil LDPE of Osborn is not merely “substituting one type of polyethylene film for another for the same purpose.” FOA 9-22-04 at 3.

Accordingly, it is respectfully submitted that it would not be obvious for one skilled in the art to modify the package taught by Riddell by utilizing packaging materials other than kraft paper, or similar material, to incorporate the films of Osborn. At best, in view of the generalized guidance of Riddell that “polyethylene films” might be suitable, one skilled in the art might find it “obvious to try various combinations” of the Osborn films. *In re Geiger*, 815 F.2d 686, 688, 2 USPQ2d 1276, 1278 (Fed. Cir. 1987). “However, this is not the standard of 35 U.S.C. §103.” *Id.* “The mere fact that the prior art may be modified in the manner suggested by the Examiner does not make the modification obvious unless the prior art suggested the desirability of the modification.” *In re Fritch*, 972 F.2d 1260, 1266, 23 USPQ2d 1780, 1784-85 (Fed. Cir. 1992).

Further, even if such a suggestion could somehow be supported, the resulting combination does not satisfy the limitation of a tearable tape strip configured to controllably tear an opening through film that has a puncture propagation tear resistance of at least 20 N/ply. The combination inner pull strip and outer guide tape of Riddell are specifically provided to tear materials exhibiting low PPT characteristics (*e.g.*, kraft paper). As such, Riddell is entirely unconcerned with the dramatic difficulties presented by attempting to tear material having a high PPT resistance (*i.e.*, at least 20 N/ply). Thus, the pull strip and guide tape of Riddell, as applied to the materials of Osborn, may or may not achieve tearing of the film, but certainly do not enable controllably tearing film having puncture propagation tear resistance of at least 20 N/ply. *Application* at 14, lines 3-6 (definition of “controllably” supplied).

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In sum, the Examiner has failed to provide any proper motivation to combine Riddell with the films of Osborn, as Riddell seeks to address an incompatible purpose with that of Osborn; there is no reasonable expectation of success from combining the two references, as the references, taken as a whole, teach away from their combination and defeat the intended use of the references; and, as recognized by the Examiner, none of the cited references alone teach or suggest all the limitations of the claims.

Therefore, it is respectfully submitted that independent claims 1, 17, and 38 present patentably distinct material from the cited references as the Examiner has failed to carry his burden of establishing a *prima facie* case of obviousness in rejecting those claims by combining Riddell in view of Osborn. The Examiner's combination of Riddell in view of Osborn, with or without additional references, in rejecting the claims depending directly or indirectly from claims 1, 17, and 38 is similarly believed improper. Therefore, it is respectfully submitted that all of the dependent claims, 2, 4-9, 11, 13-16, 18, 20-25, 27, 29-33, 35-37, 39, 41, 42, 44-52 and 56, also present patentably distinct material from the cited references.

**II. The Rejection of Independent Claims 1, 17, and 38 (and Various Claims Depending Therefrom) Under 35 U.S.C. §103(a) as Unpatentable Over U.S. Pat. No. 3,179,326 ("Underwood") in View of U.S. Pat. No. 4,397,703 ("Osborn") and U.S. Pat. No. 5,080,857 ("Leseman")**

Independent claims 1, 17, and 38 were rejected under 35 U.S.C. §103(a) as being unpatentable over Underwood in view of Osborn and Leseman. More particularly, the Examiner rejected claims 1, 2, 4-8, 11, 13, 14, 17, 18, 20, 21-24, 27, 29, 30, 33, 35-39, 41, 42, 44-48, 51, and 52 on those grounds. The Examiner also rejected several dependent claims utilizing the combination described above and another reference. In particular, the Examiner rejected claims 9, 25, and 56 under 35 U.S.C. §103(a) as unpatentable over Underwood in view of Osborn and Leseman as applied above, and further in view of U.S. Patent. No. 6,316,036 ("Hodson"). The Examiner also rejected claims 15, 16, 31, and 32 under 35 U.S.C. §103(a) as unpatentable over Underwood in view of Osborn and Leseman as applied above, and further in view of Kim. Finally, the Examiner rejected claims 49 and 50 under 35 U.S.C. §103(a) as unpatentable over

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Underwood in view of Osborn and Leseman as applied above, and further in view of U.S. Pat. No. 5,885,630 (“Zurawski”).

In the Final Office Action, the Examiner acquiesced that Underwood is silent regarding material exhibiting a puncture propagation tear resistance of 20 N/ply, and that Underwood is also silent regarding reinforced strapping or filament reinforced tearable tape as required by the limitations of claims 1, 17, and 38. *FOA 9-22-04* at 5. The Examiner then relied on Osborn in order to modify Underwood to incorporate tear-resistant films and relied on Leseman in order to modify Underwood to incorporate reinforced tape.

Underwood relates to a method for forming uniaxially oriented films to be used as heat sealable tear tapes for “flexible” thermoplastic wrapping films, particularly, “polyethylene film,” to allow replacement of paper and cellulosic wrapping films associated with tightly wrapped packages, such as gum or cigarettes. *See Underwood* at col. 1, lines 11-34; Figs. 2 & 3. Underwood stresses that the “tremendous tensile strength and decrease in elongation” make the uniaxially oriented film “admirably suited” for tear tape. *Underwood* at col. 6, lines 39-43. Underwood also indicates that the uniaxially oriented tear tape can be treated to avoid objectionable distortion of the thermoplastic wrapping film when the tear tape is heat sealed to it. *Underwood* at col. 7, lines 6-13; col. 8, lines 4-8.

**The Examiner’s Reliance on Osborn**

For at least the following reasons, the Examiner improperly relied upon Osborn to modify Underwood to incorporate tear-resistant films. The Examiner indicates that one having ordinary skill in the art would be motivated to modify Underwood to incorporate the materials of Osborn as a substitution of “one LDPE film for another for the same purpose of enclosing commercial goods.” *FOA 9-22-04* at 6. This is an oversimplification of the purposes of the two references. Osborn relates to commercial sacks used to hold loose bulk materials, such as grain, peat moss, etc., in 25-100 lb. lots. *Osborn* at col. 1, lines 15-20. Conversely, Underwood relates to tear tapes for a packaging film that is tightly wrapped about an article. *See, e.g., Underwood* at FIGS. 2 and 3. The Examiner must explain why the prior art would have suggested to one of ordinary skill in the art the desirability of the modification. *In re Fritch*, 972 F2d 1260, 1266, 23

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USPQ2d 1780, 1784 (Fed. Cir. 1992). One seeking to select heat sealable materials for tightly wrapping an article, such as gum or cigarettes, would not look to tarps or sacks closed with lap seams as disclosed by Osborn, nor would they expect tear tapes for one material to function with the other.

Once again, the prior art can be modified or combined only so long as there is a reasonable expectation of success. The packaging materials contemplated by Underwood are apparently comparable to, even if not as easily torn as, the cellophane otherwise used to package cigarettes, the material use Underwood seeks to replace. In contrast, the Osborn sack materials must serve an entirely different purpose, with requisite toughness to maintain upwards of 100 lbs. of aggregate without breaking when dropped from heights of greater than 5 feet. *See Osborn* at col. 20-21, tbl. II. A requisite reasonable expectation of success does not exist, as one would not ordinarily expect Underwood's tear tape, aimed for use with materials serving applications similar to cellophane packaging, to remain sealed or to be able to open the materials disclosed in Osborn, which must serve in the more demanding applications previously described. In light of the above, the fact that both references address "enclosing commercial goods" is too attenuated of a connection to provide the requisite motivation to combine.

In sum, the Examiner has failed to provide any proper motivation to combine Underwood with the films of Osborn, as Underwood seeks to address an incompatible purpose with Osborn; there is no reasonable expectation of success from combining the two references, as the references, taken as a whole, would defeat the intended use of Underwood; and, as recognized by the Examiner, none of the cited references alone teach or suggest all the limitations of the claims.

**The Examiner's Reliance on Leseman**

For at least the following reasons, the Examiner also improperly relied upon Leseman in order to modify Underwood to incorporate fiber reinforced tear tapes. The Examiner indicated that one having ordinary skill in the art would be motivated to make such a combination as fiber reinforced tapes are an improvement on oriented flat tapes in that they "provide very good cross-direction tear resistance to further enhance the 'clean tear' purpose of Underwood." *FOA 9-22-04* at 6. However, Underwood does not describe any greater need for improved cross-direction

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tear resistance than that supplied by Underwood's tear tape. In particular, Underwood discloses that the "tremendous tensile strength and decrease in elongation of the highly uniaxially [oriented] ... film" (*Underwood* at col. 6, lines 36-46) and the ability to treat the uniaxially oriented material such that heat sealing it to thermoplastic film material does not cause shrinking (*Underwood* at col. 7, lines 27-31) allow the film to be well-suited to act as a tear tape in the described applications. It is unclear how much of Underwood's success is tied to the fact that the tear strip is heat sealed to the thermoplastic film. Leseman does not provide any clarity in this respect, and in fact, is aimed toward providing a pressure sensitive adhesive tape. *Leseman* at col. 1, lines 7-9. Indeed, none of the cited references address what effect filament reinforcement could have on the efficacy of a tear strip heat sealed to a thermoplastic film material package, much less one formed of material somewhat similar to cellophane. As evidence that Underwood had access to filament reinforced tapes during patenting, U.S. Pat. No. 2,750,315 to Tierney (a reference cited by Leseman) shows that reinforced tapes were generally known at the time Underwood patented the uniaxially oriented heat sealable tear strips.

In light of the above, there would be no reasonable expectation of success from the modification of Underwood to incorporate the filament reinforced tape of Leseman. The fact that Underwood achieves the purpose of effectively heat sealing a uniaxially oriented and properly functioning tear strip to a thermoplastic package; the fact that there is no evidence in the cited references as to what effect filament reinforcement would have on such a purpose; and the fact that filament reinforced tapes were known at the time Underwood was written, all mandate this conclusion. Thus, there is no indication in the cited references that Leseman presents an improvement to Underwood that would motivate one having ordinary skill in the art to incorporate the filament reinforced tapes of Leseman into Underwood. Thus, the Examiner's reliance on the references is improper, as the factual question of whether to combine references cannot "be resolved on subjective belief and unknown authority." *In re Lee*, 277 F.3d 1338, 1343-44, 61 USPQ2d 1430, 1434 (Fed. Cir. 2002). Furthermore, as recognized by the Examiner, none of the cited references alone teach or suggest all the limitations of the claims.

Therefore, it is respectfully submitted that independent claims 1, 17, and 38 present patentably distinct material from the cited references as the Examiner has failed to carry his

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Title: PLASTIC FILM PACKAGING WITH TEARABLE TAPE STRIP

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burden of establishing a *prima facie* case of obviousness in rejecting independent claims 1, 17, and 38 by combining Underwood in view of Osborn and Leseman. The Examiner's combination of those references, with or without additional references, in rejecting the claims depending directly or indirectly from claims 1, 17, and 38 is similarly believed improper. Therefore, it is respectfully submitted that all dependent claims, 2, 4-9, 11, 13-16, 18, 20-25, 27, 29-33, 35-37, 39, 41, 42, 44-52 and 56, also present patentably distinct material from the cited references.

**Conclusion**

In view of the above, the Examiner has failed to establish a *prima facie* case of obviousness in the Final Office Action mailed September 22, 2004, since neither the Examiner nor the cited references provided the requisite motivation to combine the references. Hence, it is believed that the rejection of independent claims 1, 17, and 38 under 35 U.S.C. §103(a) has been overcome. Dependent claims 2, 4-9, 11, 13-16, 18, 20-25, 27, 29-33, 35-37, 39, 41, 42, 44-52 and 56 are either directly or indirectly dependent upon independent claims 1, 17, and 38. Therefore, the rejection of those dependent claims under 35 U.S.C. §103(a) is also overcome.

Appellant respectfully submits that the Examiner has presented the best available prior art against the invention claimed in the pending application. The prosecution of the pending application has proceeded through four substantive Office Actions and Responses. For the reasons discussed above, the cited art neither anticipates nor renders the claimed invention obvious. Therefore, Appellant respectfully submits that the rejections of claims 1, 2, 4-9, 11, 13-18, 20-25, 27, 29-33, 35-39, 41, 42, 44-52, and 56 under 35 U.S.C. §103(a) must be reversed and that these claims be allowed.

Any inquiry regarding this Appeal Brief to the Board of Patent Appeals and Interferences of the United States Patent and Trademark Office should be directed to Melissa E. Buss at Telephone No. (651) 736-7421, Facsimile No. (651) 736-3833. In addition, all correspondence should continue to be directed to the following address:

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Respectfully submitted,

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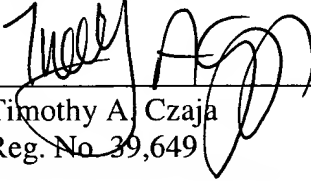
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**CERTIFICATE UNDER 37 C.F.R. 1.8:**

The undersigned hereby certifies that this paper or papers, as described herein, are being deposited in the United States Postal Service, as first class mail, in an envelope address to: Mail Stop Appeal Brief – Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on this 19<sup>th</sup> day of January, 2005.

By 

Name: Timothy A. Czaja

**Appendix**

Applicant: Timothy V. Stagg et al.

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Filed: December 1, 2000

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Title: PLASTIC FILM PACKAGING WITH TEARABLE TAPE STRIP

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1. Packaging for containing an article, the packaging comprising:
  - a continuous, tear-resistant film formable to define an enclosed region for containing an article, wherein the film is characterized by a puncture-propagation tear resistance of at least 20 N/ply; and
  - a tearable tape strip secured to the film, the tearable tape strip being defined by opposing, longitudinal edges and a central section, the central section being tearable relative to the opposing, longitudinal edges such that the tearable tape strip is internally tearable, and wherein the tearable tape strip comprises one of reinforced strapping tape and filament reinforced tape;
  - wherein the tearable tape strip is configured to controllably tear an opening through the film for accessing the enclosed region upon tearing of the tearable tape strip.
2. The packaging of claim 1, wherein the film is not otherwise cleanly tearable.
4. The packaging of claim 1, wherein the film is tough and exhibits stretching before tearing in response to a tearing force imparted at a nick formed in the film.
5. The packaging of claim 1, wherein the film includes a material selected from the group consisting of polyethylene, linear low-density polyethylene, low-density polyethylene, Surlyn® ionomer film, Kraton/polypropylene blends, copolymers of propylene and ethylene, blends of polypropylene and polyethylene, nylon, polyvinyl chloride, and polyvinylidene chloride.
6. The packaging of claim 1, wherein the film includes multiple layers.
7. The packaging of claim 6, wherein the film includes a first layer of polyethylene and a second layer of polypropylene.



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8. The packaging of claim 1, wherein the film defines an inner surface and an outer surface, and further wherein the tearable tape strip is secured to the inner surface.

9. The packaging of claim 8, wherein the film further includes indicia disposed on the outer surface opposite the tearable tape strip, the tearable tape strip being located so as to not obstruct viewing of the indicia.

11. The packaging of claim 1, wherein the tearable tape strip is reinforced strapping tape having a width of at least 8 mm.

13. The packaging of claim 1, wherein the tearable tape strip is defined by a body and a tab, and further wherein the film is unweakened in the area of interface with the body.

14. The packaging of claim 1, wherein only a single tearable tape strip is provided.

15. The packaging of claim 1, wherein the tearable tape strip is a first tearable tape strip configured to be internally tearable and is secured to an inner surface of the film, the packaging further comprising:

a second, internally tearable tape strip secured to an outer surface of the film substantially opposite the first tearable tape strip;

wherein at least a portion of a width of the first tearable tape strip overlaps at least a portion of a width of the second tearable tape strip such that a single band of material can be unitarily torn from both of the tearable tape strips.

16. The packaging of claim 1, further comprising:

a cover tape secured to a surface of the film opposite the tearable tape strip.

17. A packaged good article comprising:

an article; and

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a package comprising:

a continuous, tear-resistant film forming an enclosed region within which the article is contained, wherein the film is characterized by a puncture-propagation tear resistance of at least 20 N/ply; and

a tearable tape strip secured the film, the tearable tape strip being defined by opposing, longitudinal edges and a central section, the central section being tearable relative to the opposing, longitudinal edges such that the tearable tape strip is internally tearable, and wherein the tearable tape strip comprises one of reinforced strapping tape and filament reinforced tape;

wherein the tearable tape strip is configured to controllably tear an opening through the film for accessing the article upon tearing of the tearable tape strip.

18. The packaged good article of claim 17, wherein the film is not otherwise cleanly tearable.
20. The packaged good article of claim 17, wherein the film is tough and exhibits stretching before tearing in response to a tearing force imparted at a nick formed in the film.
21. The packaged good article of claim 17, wherein the film includes a material selected from the group consisting of polyethylene, linear low-density polyethylene, low-density polyethylene, Surlyn® ionomer film, Kraton/polypropylene blends, copolymers of propylene and ethylene, blends of polypropylene and polyethylene, nylon, polyvinyl chloride, and polyvinylidene chloride.
22. The packaged good article of claim 17, wherein the film includes multiple layers.
23. The packaged good article of claim 22, wherein the film includes a first layer of polyethylene and a second layer of polypropylene.

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24. The packaged good article of claim 17, wherein the film defines an inner surface and an outer surface, and further wherein the tearable tape strip is secured to the inner surface.

25. The packaged good article of claim 24, wherein the film further includes indicia disposed on the outer surface opposite the tearable tape strip, the tearable tape strip being located so as to not obstruct viewing of the indicia.

27. The packaged good article of claim 17, wherein the tearable tape strip is reinforced strapping tape having a width of at least 8 mm.

29. The packaged good article of claim 17, wherein the tearable tape strip is defined by a body and a tab, and further wherein the film is unweakened in the area of interface with the body.

30. The packaged good article of claim 17, wherein only a single tearable tape strip is provided.

31. The packaged good article of claim 17, wherein the tearable tape strip is a first tearable tape strip configured to be internally tearable and is secured to an inner surface of the film, the packaging further comprising:

a second, internally tearable tape strip secured to an outer surface of the film substantially opposite the first tearable tape strip;

wherein at least a portion of a width of the first tearable tape strip overlaps at least a portion of a width of the second tearable tape strip such that a single band of material can be unitarily torn from both of the tearable tape strips.

32. The packaged good article of claim 17, further comprising:

a cover tape secured to a surface of the film opposite the tearable tape strip.

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33. The packaged good article of claim 17, wherein the article includes a food product.
35. The packaged good article of claim 17, wherein the tear-resistant film is wrapped about the article.
36. The packaged good article of claim 17, wherein the package substantially conforms to a shape of the article.
37. The packaged good article of claim 17, wherein the article includes a base supporting at least one product, at least a portion of the package conforming to a shape of the base.
38. A method of packaging an article, the method comprising:  
providing an article;  
providing a continuous, tear-resistant film characterized by a puncture-propagation tear resistance of at least 20 N/ply;  
securing a tearable tape strip to a surface of the film, the tearable tape strip being defined by opposing, longitudinal edges and a central section, the central section being tearable relative to the opposing, longitudinal edges such that the tearable tape strip is internally tearable, and wherein the tearable tape strip comprises one of reinforced strapping tape and filament reinforced tape; and  
forming the film to define an enclosed region containing the article;  
wherein the tearable tape strip is configured to controllably tear an opening through the film for accessing the article upon tearing of the tearable tape strip.
39. The method of claim 38, wherein providing an article includes providing a food product.
41. The method of claim 38, wherein providing an article includes providing a base supporting at least one product.

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42. The method of claim 38, wherein providing a tear-resistant film includes providing a film that is not otherwise cleanly tearable.

44. The method of claim 38, wherein providing a tear-resistant film includes providing a tough film that exhibits stretching before tearing in response to a tearing force imparted at a nick formed in the film.

45. The method of claim 38, wherein providing a tear-resistant film includes providing a film that includes a material selected from the group consisting of polyethylene, linear low-density polyethylene, low-density polyethylene, Surlyn® ionomer film, Kraton/polypropylene blends, copolymers of propylene and ethylene, blends of polypropylene and polyethylene, nylon, polyvinyl chloride, and polyvinylidene chloride.

46. The method of claim 38, wherein providing a tear-resistant film includes providing a multi-layer film including a first layer of polyethylene and a second layer of polypropylene.

47. The method of claim 38, wherein a single, tearable tape strip is secured to a surface of the film.

48. The method of claim 38, wherein the film defines an inner surface and an outer surface, and further wherein the tearable tape strip is secured to an inner surface of the film.

49. The method of claim 38, wherein forming the film to define an enclosed region includes shrink-wrapping the film about the article.

50. The method of claim 38, wherein forming the film to define an enclosed region includes skin packaging the film about the article.

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51. The method of claim 38, wherein forming the film to define an enclosed region includes wrapping the film about the article such that the film conforms with a shape of the article.

52. The method of claim 38, wherein the tearable tape strip is defined by a body and a tab, and further wherein securing a tearable tape strip to a surface of the film includes locating the body along an unweakened area of the film.

56. The packaged good article of claim 33, wherein the film directly contacts the food product.